No. 243.
Def. of J. McGowan for Appellant.
Supreme Court of the United States.
OCTOBER TERM, 1900.
Filed Oct. 27, 1900.

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BARBARA CHAVEZ DE ARMIJO,
APPELLANT,
vs.
JUSTO R. ARMIJO, APPELLEE.
No. 243.

REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

J. H. McGOWAN,
For Appellant.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1900.

Supreme Court of the United States.

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BARBARA CHAVEZ DE ARMIJO,
APPELLANT,
v.
JUSTO R. ARMIJO.
No. 243.

Reply to Appellees' Motion to Dismiss or Affirm.

The motion to dismiss is asked on four grounds, first, that the appellant did not file the record of the case with this Court as required by section **1** of rule **9**; second, that the transcript is not made up in accordance with the requirements of section **2** of the Act of April 7, 1874 (18 Stats., 27), third, because the Supreme Court of the Territory of New Mexico refused to certify a statement of facts in the case in the nature of a special verdict, and, fourth, because the assignment of errors filed with the transcript raises no question which can be reviewed by this Court on this record.

I.

Referring to the first ground stated above, we observe that the appeal was allowed January 26, 1900, and the record duly filed in this Court April 6, 1900, both dates being within the October term, 1899. The notice of the motion to dismiss was not made until after the opening of the October term, 1900. This Court has frequently held that the transcript of record may be filed at any time pursuant to the rules of the Supreme Court succeeding the taking of the appeal or bringing the writ of error, if in the meantime the appellee or defendant in error has not taken advantage of the provision in paragraph **1** of rule **9** to have the cause docketed and dismissed. Green *v.* Elbert, 137 U. S. 615, and other decisions cited therein.

II.

In response to the allegation that the transcript is not made up in accordance with the requirements of section **2,** of said Act of April 7, 1874, relating to the jurisdiction of this Court over the matter of appeal, etc., from the Territorial Courts, it is to be said that the appellant complied with the statute as nearly as she could.

The record, only extracts of which have been printed, shows the case to be one of assumpsit, the declaration being on the common counts, the defendant (appellant here) pleading the general issue and giving notice of set-off. There was no disclosure in the declaration that the plaintiff claimed that a written contract existed between himself and the defendant. It was made apparent to the trial court that the case involved the examination of accounts between the parties, and upon motion of defendant it was referred to a referee to take proofs and report

back to the Court. Immediately in entering upon the examination of the witnesses, the plaintiff undertook to show that a written contract had been made between himself and the defendant, fixing a salary to run indefinitely at $2,500 a year, which salary was the principal item of the plaintiff's claim. Plaintiff testifies that there was but one copy of the written contract made, and that it had been delivered to him upon its execution, and he had lost it. He tendered in evidence an alleged copy, which he admitted was made from his memory only. The referee admitted this copy in evidence under objection, and it was marked as one of the exhibits in the case. He also admitted evidence tending to show the value of the services of the plaintiff upon the *quantum meruit*, all of which was objected to by defendant, and the objections duly noted by the referee, exceptions being taken at the same time to the rulings of the referee. Numerous other objections and exceptions appear throughout the testimony.

On the 18th of August, 1898, the report of the referee was filed in the Court, in the body of which the statement is made "that a large amount of typewritten testimony was taken before me, comprising 161 pages of such typewritten testimony, and a large number of exhibits were introduced in evidence and filed with me as referee, *all of which testimony and exhibits are returned herewith as a part of my report.*"

Upon the filing of this report, the defendant filed exceptions thereto, referring to the various objections and exceptions which appear in the report, but the Court overruled the exceptions and denied the motion to again refer the case, and immediately entered up judgment against the defendant for the amount found by the referee, to wit, $6,097.92. This judgment, which is found on pages 10*b* and 10*c* of

the extracts from the transcript of record now before the Court, duly signed by the judge, terminates with these words: "And thereupon the defendant, by her attorneys, gives notice of an appeal to the Supreme Court of the Territory of New Mexico."

The judgment was entered September 15, 1898, and October 4, 1898, the defendant filed her appeal bond which was duly approved by the judge.

For some reason which the record does not disclose, there had been no formal order entered upon the records of the Court granting the appeal. After the appeal bond was filed, to wit, on the 13th of July, 1899, the defendant, by her attorneys, moved the Court for an order directing the clerk to enter an order granting the appeal as of October 4, 1898. This motion the Court overruled and denied. (See extracts from Transcript 10*e* and 10*f*.) Subsequently, the defendant sued out a writ of error from the Supreme Court of the Territory of New Mexico, filed a bill of exceptions, and duly presented the same to the Court to be settled and approved, but the court declined to do so, the defendant excepting to the action of the Court. Exception was also duly taken to the refusal of the judge to direct the clerk to enter an order *nunc pro tunc* granting an appeal.

But without regard to the aforesaid rulings of the trial judge, the case seems to have been duly docketed in the Supreme Court of the Territory as two separate cases, one upon the writ of error the other upon the appeal. The transcript of record certified up from the District Court embraced the entire report made by the referee, including the testimony with the objections and exceptions saved and reserved and noted therein. Assignment of errors were duly filed by the defendant in the Supreme Court. These were **9** in number, and are found on page **11** of the extracts.

Following the filing of the assignment of errors by the plaintiff in error, the appellee and defendant in error filed a motion to strike from the transcript filed in each of the two cases so much and such part thereof as purported to set forth the evidence adduced on the hearing of the cause sought to be reviewed, and to affirm the judgment of the court below, and to enter judgment in the Supreme Court against the appellant and the sureties on her supersedeas bond for the amount of said judgment. This motion to strike from the transcript the evidence in the case and to affirm the judgment of the court below was submitted to the Supreme Court of New Mexico, and the motion overruled, except in that portion which asked an affirmance of the judgment of the court below. The judgment was then declared to be affirmed on the sole ground that no motion for a new trial was filed in said cause.

The defendant moved for a rehearing, but the motion was overruled. An appeal to this Court was asked and allowed, but the application made by the appellant to have the court find the facts in the case, in accordance with the requirements of the act of Congress, was denied on the ground that "the appeal had not been perfected in such manner as to bring the facts of the case into this Court."

In an act by the Territorial Legislature, approved March 16, 1899, found on pages 13, 14, and 15 of the brief filed in support of the motion in this case, it was made the law of the Territory that—

> "In all actions tried without a jury, the testimony taken before a court, or that taken by a referee, the transcribed notes of the stenographer in such cases properly certified by the court or referee, and all motions, orders, or decisions made or entered in the progress of the trial of any action, shall become and be a part of the record for the purpose of having the

> case reviewed by the Supreme Court upon appeal or writ of error, without any bill of exceptions settled, signed or sealed, in order to make any such matters a part of the record in cases so tried. It shall not be necessary to make a motion for a new trial in any case tried by the court without a jury, nor shall it be necessary to incorporate a motion for a new trial in a bill of exceptions in any case, but the same shall become a part of the record without so doing."

It appears to us that this is sufficient reply to the second point made in support of the motion. The case was before the court both on appeal and writ of error. It will not do to say that the testimony taken before the referee and containing the objections and exceptions was not a part of the record. This statute explicitly makes it a part of the record. Neither will it do to say that the appeal from the District Court was not properly taken. The court, in rendering the judgment below, explicitly stated that the appeal was asked, and very soon thereafter it approved the appeal bond which specifically provided that the appellant should prosecute her appeal with diligence in the Supreme Court, etc. It was neither material nor necessary to enter upon the records of the court a special order of allowance of the appeal. In Brandies *v.* Cochran, 105 U. S. 262, Chief Justice Waite, delivering the opinion of the court, says: "The circuit judge by taking the security and signing the citation allowed an appeal. No formal allowance was necessary." In support of this the court cites Sage *v.* R.R. Co., 96 U. S. 714. In Brown *v.* McConnell, 124 U. S. 489, the Court, by Chief Justice Waite, declares: "If an appeal is taken by the action of the court in session before the end of the term at which the decree is rendered, no formal citation is necessary, because both parties, being constructively in

court during the entire term, they are charged by law with notice of all that is done in the case affecting their interests." * * * "The appeal taken in open court, if docketed here in time, gives this Court jurisdiction of the subject-matter, and invests it with power to make all orders consistent with proper practice which are needed in the furtherance of justice."

These decisions indicate a general principle which should apply in taking appeals, and I find no law of the Territory modifying the rule. The appeal, therefore, was properly taken from the District Court to the Territorial Supreme Court. The record was properly before that court. The judgment in the lower court was affirmed by the Supreme Court of the Territory on the specific ground that no motion for a new trial had been made in the case below, but the law states that it shall not be necessary to make a motion for new trial in any case tried by the court without a jury. And after disposing of the case in that way, it declined to find the facts upon the record then before it on the ground that the appeal had not been perfected in such manner as to bring the facts of the case into that court.

If the appeal was taken, the whole record of the case was properly in the Supreme Court. And if the obvious meaning of the Territorial law of March 16, 1899, is to control, it was not necessary that a motion should be made for a new trial in the District Court. The Supreme Court therefore erred both in confirming the judgment below, without hearing the case upon the merits, on the ground that there had been no motion for a new trial, and erred in refusing to find the facts because the appeal had not been perfected in such manner as to bring the facts of the case before the court.

As what we have here said goes to both the second and

third points raised by the attorney for the appellee in his motion to dismiss, we shall proceed to examine the last point.

IV.

On this point the attorney declares that the assignments of error filed with the transcript raise no questions which can be reviewed by this Court on this record.

The assignments of error are found on page 21 of the Extracts. If the record of the case in the District Court was properly before the Supreme Court, and if the defendant below was not required to make a motion for a new trial before the Trial Court, then certainly the Territorial Supreme Court erred in its judgment, and erred in refusing to make the findings of facts as required by the U. S. Statutes and the rules of this Court. These errors are sufficiently set out by the attorney for the appellant as will be seen by reference thereto. The third assignment is that the court erred in dismissing said appeal and writ of error, and affirming the judgment of the said District Court for the reasons set forth by the court in its said action and decision. And the fourth assignment declares it to have been error to affirm the judgment of the District Court on the ground that the Transcript of the Record showed that no motion for a new trial had been made. The fifth assignment is: "The court erred in refusing to make findings of fact on which it based its action in dismissing said appeal and writ of error."

The refusal of the Territorial Supreme Court to make findings of fact is put squarely upon the ground that the appeal was not perfected in such manner as to bring the facts of the case into the court. Yet the court examined into the record in order to ascertain whether or not there was such a motion made. If the record was sufficiently

before the court for one purpose, it certainly was for the other.

In his argument in support of his motion, counsel for appellee suggests that the referee by reason of the reference became an independent tribunal, "a mere arbitrator, with power to bind the appellant alone." This sounds like quite a new doctrine. A court cannot usually delegate its judicial powers. The reference in this case was made to Mr. Lee, "as referee, to take the proofs of the *plaintiff* herein, and that said referee, to whom this cause is referred, report his findings of fact and conclusions of law in this cause with all possible speed." The court could not authorize him to decide the case, and made no attempt to do so. He was simply the hand of the court to save the judge from the drudgery of taking the testimony. All his authority must be found in the order of reference. The learned counsel does not suggest any statute or decision to aid his assertion that the referee was an "independent tribunal." But he does suggest that the trial justice refused to settle a bill of exceptions when asked to do so by the appellant, upon the ground, among others, that the referee was an arbitrator with power to bind the appellant alone.

It looks very much as if the District Court and the Territorial Supreme Court had both taken the same view of the powers and functions of the referee as that suggested by counsel in his brief here. The Trial Court must have said, "I will not settle a bill of exceptions as your case was tried before the referee. The proofs, exhibits, objections, and exceptions are not before me; I shall give no attention to any portion of the referee's report other than his recommendation that judgment be entered against defendant for $6,097.92. I will adopt the findings of the referee as the findings of the court, but I will not look into the record of proofs to see if such findings

are bottomed on legal and sufficient evidence. The referee is an independent tribunal with power to bind the appellant alone, and having reported in favor of a judgment against the appellant, that judgment and none other shall be entered."

Taking this standpoint, the court refused to examine the testimony taken by the referee for the purpose of settling a bill of exceptions, although the statute of the Territory specifically declared that such testimony, when properly filed in the court, "shall become a part of the record for the purpose of having the case reviewed by the Supreme Court upon appeal or writ of error."

And probably, for some equally good reason, the District Court refused to direct the entry of a formal order allowing appeal. And the Supreme Court, not having a bill of exceptions before it, although the whole record was there on appeal, refused to make findings of fact, as it refused to look into the record brought upon appeal for the purpose of trying the case upon its merits.

With these facts apparent in the record, counsel complains that the appellant has brought the case to this court without "a statement of facts of the case in the nature of a special verdict," as provided in section 2 of the act of April 7, 1874. The obligation under that act is upon the *court* to make and certify such a statement. If the court refuses to do this, the appellant has no other recourse than to have the whole record brought up. Therefore, as we said in the beginning, the appellant has done what she could to get her case properly heard by this Court.

We submit that the case should neither be dismissed nor affirmed, but that all the questions raised should be left to be heard upon the argument of the case on its merits.

J. H. McGOWAN,
Attorney for Appellant.